

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN FOLKS,	§
	§ No. 311, 2005
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0306015047A
	§
Plaintiff Below-	§
Appellee.	§

Submitted: November 14, 2005

Decided: January 26, 2006

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices

ORDER

This 26th day of January 2006, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, John Folks, was found guilty by a Superior Court jury of Robbery in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony. He was sentenced on the robbery conviction to 12 years incarceration at Level V, to be suspended after 10 years for decreasing levels of probation, and on the weapon

conviction to 10 years incarceration at Level V.¹ This is Folks' direct appeal of his sentences following re-sentencing by the Superior Court.

(2) Folks' trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.²

(3) Folks' counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Folks' counsel informed Folks of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the accompanying brief and the complete trial transcript. Folks also was informed of his right

¹ The Superior Court previously had sentenced Folks as a habitual offender to a total of 40 years of Level V incarceration. On direct appeal, this Court affirmed Folks' convictions, but vacated his sentences and remanded the matter to the Superior Court for re-sentencing. This Court held that, because of an "ambiguity in identity," the State had failed to prove beyond a reasonable doubt that Folks had committed a 1977 weapon offense and, therefore, was eligible to be sentenced as a habitual offender. *Folks v. State*, Del. Supr., No. 291, 2004, Steele, J. (Apr. 25, 2005).

² *Penon v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

to supplement his attorney's presentation. Folks responded with a brief that raises one issue for this Court's consideration. The State has responded to the position taken by Folks' counsel as well as the issue raised by Folks and has moved to affirm the Superior Court's judgment.

(4) Folks raises one issue for this Court's consideration. He claims that the Superior Court's consideration of a 1977 conviction of carrying a concealed deadly weapon was improper for purposes of his re-sentencing because that was the conviction this Court determined was invalid for establishing his status as a habitual offender.

(5) The transcript of Folks' re-sentencing reflects the following. The State no longer sought to have Folks sentenced as a habitual offender. Folks' attorney conceded that Folks had been convicted of carrying a concealed deadly weapon in 1977. After hearing argument by Folks, Folks' attorney and the attorney for the State, the Superior Court stated, "I'm not sentencing you as a habitual offender. . . . in this case, though, I think it's to be expected that when a fourth felony comes along, . . . the sentence is going to spike upwards previous shorter sentences were not successful in keeping the public safe from acts of violence committed by you."

(6) We find no error or abuse of discretion on the part of the Superior Court. Under the circumstances of this case, the Superior Court

was within its discretion to consider the previous 1977 conviction in sentencing Folks, since it constituted relevant information pertaining to Folks' personal history.³ Moreover, there is no evidence that the sentences imposed were illegal. While severe, the sentences were within the limits authorized by statute.⁴

(7) This Court has reviewed the record carefully and has concluded that Folks' appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Folks' counsel has made a conscientious effort to examine the record and has properly determined that Folks could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Myron T. Steele
Justice

³ *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992).

⁴ Del. Code Ann. tit. 11, §§ 832 and 1447; *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989).